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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-857

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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Evco, a New Mexico corporation, d/b/a Evco Instructional Designs, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New Mexico entered in the above entitled case on July 30, 1971 which, after denial of Writ of Certiorari to the Supreme Court of the State of New Mexico on September 29, 1971 became final by entry of Final Order on September 29, 1971.

This is the second time this case has come before this Court upon Petition for Writ of Certiorari to the Court of Appeals of the State of New Mexico. The first Petition, which was docketed on November 2, 1970, as No. 928, October Term, 1970, was granted. *Evco* v. *Jones, et al.*, 402 U.S. 969, 91 S. Ct. 1655, 29 L.Ed.2d 134 (1971). The Writ of Certiorari is printed in Appendix B hereto, *infra*, p. A26.

The New Mexico Attorney General in his Brief in Opposition to Petition for Writ of Certiorari in No. 928, stated:

> "While this document is entitled 'Brief in Opposition', Respondents wish to make it clear that they agree with Petitioner's position concerning the incorrectness of the New Mexico Court of Appeals decision on the second issue involved in *Evco* v. *Jones*, 81 N.M. 724, 472 P.2d 987 (1970)."

Upon reconsideration, as directed by this Court in its Writ of Certiorari, the Court of Appeals of the State of New Mexico decided the interstate commerce issue the same way it had decided it originally. Both Petitioner and Respondents urged that Court to adopt the position taken by Petitioner throughout.

CITATIONS TO OPINIONS BELOW

The first opinion of the Court of Appeals of the State of New Mexico, printed in Appendix B hereto, *infra*, p. A2, is reported in 81 N.M. 724, 472 P.2d 987 (1970). The second opinion, also printed in Appendix B hereto, *infra*, p. A29 is reported in 488 P.2d 1214 (1971).

JURISDICTION

The Court of Appeals of the State of New Mexico on remand, rendered the Judgment by Opinion on July 30, 1971. Rehearing was denied August 24, 1971. Application for Writ of Certiorari was denied by the Supreme Court of the State of New Mexico on September 29, 1971. Thereupon, the Final Order was entered by the Court of Appeals of the State of New Mexico on September 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Whether Petitioner's gross receipts from sales of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax as being sales in interstate commerce.

STATUTES INVOLVED

The statutory provisions involved are Art. I, Sec. 8, Cl. 3 of the United States Constitution; and Sec. 72-16A-14.10, N.M.S.A., 1953 Comp. (July 1, 1967). They are printed in Appendix A, *infra*, Al.

STATEMENT

Direct appeal to the Court of Appeals of the State of New Mexico was taken by Petitioner taxpayer from a written order of Respondent Commissioner of Revenue, pursuant to Sec. 16-17-8 (F), N.M.S.A., 1953 Comp. (Supp. 1969), and Sec. 72-13-39, N.M.S.A., 1953 Comp. (Repl. 10, pt. 2, Supp. 1969). The case was presented to the lower Court upon a Stipulation of Facts.

In its opinion the lower Court decided that Petitioner was involved in the production or creation of tangible

personal property, and that sales thereof to the United States, the State of New Mexico, their departments and instrumentalities, and sales to certain nonprofit organizations, were exempt from the Emergency School Tax Act and the Gross Receipts Tax Act, by virtue of Sec. 72-16-5, N.M.S.A., 1953 Comp., and Sec. 72-16A-14.G, N.M. S.A., 1953 Comp.

In its opinion the Court further held that Petitioner's gross receipts from sales of such tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are not exempt from the Emergency School Tax Act and the Gross Receipts Tax Act as being sales in interstate commerce. On June 17, 1970, both Petitioner and Respondent filed Motions for Rehearing. (Appendix B, *infra,* pp. A24-A25). Both Motions for Rehearing were denied on July 7, 1970. On July 20, 1970 Respondent filed a Petition for Writ of Certiorari to the Court of Appeals of New Mexico in the Supreme Court of New Mexico. (Appendix B, *infra,* p. A19). Petitioner filed its Response to Petition for Writ of Certiorari-Petition for Writ of Certiorari. The Supreme Court entered its Order denying both Petitions for Writ of Certiorari on July 31, 1970. (Appendix B, *infra,* p. A18). Thereupon, the Final Order of the Court of Appeals was entered August 4, 1970. (Appendix B, *infra,* p. A17).

Although Respondent in its Motion for Rehearing and Petition for Writ of Certiorari continued to assert its position that the subject matter of Petitioner's sales was the sale of "services" rather than the sale of "tangible personal property," Respondent joined Petitioner in asserting that if the sales were of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, Petitioner's gross

receipts from such sales are exempt from Emergency School Tax and Gross Receipts Tax as being sales in interstate commerce.

Both Petitioner and Respondents asserted this same position before this Court and upon remand to the Court of Appeals of the State of New Mexico.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's Gross Receipts from Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery Is Made Outside the State of New Mexico, Are Exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax As Being Sales in Interstate Commerce.

The Court of Appeals states the facts applicable to the issue involved here as follows:

> "The taxpayer claims exemption here upon the ground that the imposition of the taxes would constitute a tax upon interstate commerce. Paragraph 9(j) of the Stipulation, as quoted, shows, and the taxpayer has so asserted in its Brief in Chief, that the contracts were negotiated and entered into outside the State of New Mexico, and the items of tangible personal property produced by the taxpayer pursuant to these contracts were delivered outside New Mexico. However, the actual performance of all work in the production of this property was accomplished by the taxpayer within New Mexico, where it maintains its principal office."

Although Respondent took the position on the direct appeal to the Court of Appeals that such sales were not exempt as being in interstate commerce, it joined with

the Petitioner in taking the opposite position in its Motion for Rehearing and Petition for Writ of Certiorari. (Appendix B, *infra*, pp. A24, A19).

The Emergency School Tax Act, which was in effect during the first part of the taxable period, contains no provision with respect to exemption of transactions in interstate commerce. Likewise, the regulations thereunder contain no such provision. For the taxable period after July 1, 1967, the Gross Receipts Tax Act provides:

> "Sec. 72-16A-14.10. Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution."

The Bureau of Revenue regulations promulgated under Sec. 72-16A-14.10 contained nothing specific with regard to either "inshipments" or "outshipments." On December 5, 1969, after the close of the taxing period specifically involved, the Bureau of Revenue adopted a new regulation, interpreting the applicability of this section, as follows:

> "Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where delivery is made out-of-state by seller's vehicle, U. S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller." G. R. Regulation 14.10-2.

Of this subsequent regulation the Court of Appeals stated:

> "It appears this interpretation of the statute would clearly exempt the gross receipts from the sales in question from the Gross Receipts and Compensating Tax Act, but we are not required to determine whether this regulation is an invalid attempt to negate §72-

16A-14.10, supra, because the regulation does not apply to the taxing period with which we are concerned." (Appendix, B, *infra*, p. A14).

The Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3, delegates to Congress the power "... to regulate commerce with foreign nations, and among the several states." Since the Constitution says nothing further with regard to what constitutes a regulation of interstate commerce, this determination has been worked out in a long series of decisions of this Court. Without attempting to review all the decisions in this complex area of the law, it is submitted that the case of *J. D. Adams Manufacturing Co.* v. *Storen, et al.*, 304 U.S. 307, 58 S. Ct. 913, 82 L.Ed. 1365 (1938), is controlling in this case.

In *Adams Manufacturing Co.*, the State of Indiana attempted to impose a privilege tax measured by gross receipts upon a corporation engaged in the business of manufacturing road machinery in Indiana, and selling its products both within Indiana and in interstate commerce. The tax in question, which was described as a privilege tax upon the receipts of gross income from sales, was held void under the Commerce Clause. The Supreme Court explained that there are constitutionally permissible methods by which a state can exact compensation for business activities occurring within its boundaries, such as an excise tax on manufacturing, but that a privilege tax on sales to persons located outside the state is not one of them. In *Adams Manufacturing Co.*, there is a suggestion that the tax might have been constitutional if it had been apportioned, 304 U.S. 307, 314. This suggestion has apparently not been followed in subsequent decisions of any courts. Conversely, in *Freeman* v. *Hewitt*, 329 U.S. 249, 67 S. Ct. 274, 91 L.Ed. 265 (1946), a decision voiding the imposition of the same Indiana tax upon the receipts of an Indiana seller from the

sale of securities through the New York Stock Exchange, the apportionment concept, as applied to receipts from selling, appears to be discarded. See, *Freeman* v. *Hewitt, supra,* at p. 259 (Rutledge, J., concurring).

Chapter 34, "State Taxation of Interstate Commerce," The Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, pp. 1037-61 (June 30, 1965) analyzes the decisions of the entire subject area. In a section entitled "The Taxability of Sales of Goods Shipped Out of the State", the Report concludes, apparently upon the basis of *Adams Manufacturing Co.*:

> "Only if a tax is imposed on manufacturing, producing, or extracting may gross receipts from goods shipped out of the State be included in the measure of the tax. Otherwise, the State of origin may not tax outshipments." *Supra,* 1039.

In a per curiam opinion, the Supreme Court recently held that Utah could impose a sales tax upon in-state sales, where the purchaser picked up the property in Utah and transported it out of state. Taxation of this transaction was considered constitutional since the passage of title and delivery took place within the State of Utah. *Utah Tax Commission* v. *Pacific States Cast Iron Pipe Co.,* 372 U.S. 605, 83 S. Ct. 925, 10 L.Ed. 2d 8 (1963).

Invoking the *Adams Manufacturing Co.* case, the U.S. Court of Appeals for the Ninth Circuit has voided the imposition of a gross receipts tax by the Territory of Guam upon receipts from sales of automobile parts to a purchaser located in the Philippines. Although the contract of sale was negotiated in Guam, delivery was to be made by the seller in the Philippines. *Manila Trading & Supply Co.* v. *Maddox,* 335 F.2d 150 (9th Cir., 1964).

The Court of Appeals of the State of New Mexico, in its Opinion printed in Appendix B hereto, *infra*, p. A29, places the burden of apportioning the tax upon the Petitioner. In this, the Court appears to treat the New Mexico Emergency School Tax and the New Mexico Gross Receipts Tax as if they were each taxes on "value added" rather than taxes upon gross receipts. The Court of Appeals fails to recognize any distinction between constitutionality of taxes where "outshipments" rather than "inshipments" are involved. It places reliance upon the case of *General Motors Corporation* v. *Washington, supra*, but fails to recognize that the tax involved was imposed upon shipments coming into the destination state.

Petitioner has found no recent decisions relating to constitutionality of tax on "outshipments." Respondent suggested in a brief below that perhaps this could be explained by the fact that most states have assumed that they were without power to tax sales of goods where delivery occurs outside the state, and have excepted these transactions from the general operation of their taxing statutes. This appears also to be what New Mexico has done with respect to the regulation cited above, which appears to be based upon the clear authority of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted in this case.

Respectfully submitted,

KENDALL O. SCHLENKER
JAMES M. PARKER
JAY R. PAYNE
CHARLES I. WELLBORN

APPENDIX A

Constitution of the United States, Article I—

Section 8 (Powers of Congress.)

1. The Congress shall have power:

* * *

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

N.M.S.A., 1953 Comp., Section 72-16A-14.10—

Sec. 72-16A-14.10. Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution.

APPENDIX B

Filed: May 28, 1970

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

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Opinion

MAN, Judge.

This appeal was taken by appellant taxpayer from a ritten order of appellee Commissioner of Revenue, pur- uant to § 16-17-8(F), N.M.S.A. 1953 (Supp. 1969), and 72-13-39, N.M.S.A. 1953 (Repl. 10, pt. 2, Supp. 1969). he matter is before us on a stipulation of facts, and the ortions of this stipulation essential to a determination of ie issues presented under the points relied upon for re- ersal are:

"(1) Taxpayer, doing business as Evco Instructional Designs, is a New Mexico corporation, engaged in business as a designer or creator of instructional or educational programs. Its employees are principally writers, artists, draftsmen, production typists and administrators. Certain of the employees are skilled in originating and designing educational materials. Taxpayer is equipped and staffed to develop an educational idea all the way through to the finished product, which generally consists of reproducible originals of books, films, and magnetic audio tapes.

"(2) Taxpayer's principal office is at 235 San Pedro Drive, N.E., Albuquerque, New Mexico.

". . . .

"(6) Taxpayer's protest (to a tax assessment) is based upon the following contentions:

"(a) The assessment fails to recognize and allow exemptions from the Emergency School Tax for sales of tangible personal property to government agencies and exempt organizations for the period of time from January 1, 1966 to June 30, 1967, and such exemptions being allowed by Sec. 72-16-5, N.M.S.A. 1953 Comp.

"(b) The assessment fails to recognize and allow deductions in computing the Gross Receipts Tax for sales of tangible personal property to government agencies and exempt organizations for the period of time from July 1, 1967 to December 31, 1968, such deductions being provided by Sec. 72-16A-14 (G) and (L), N.M. S.A., 1953 Comp.

". . . .

"(e) The assessment is incorrect in that it attempts to impose a tax upon transactions which are exempt by virtue of their being in interstate commerce.

"(f) The assessment fails to recognize and allow deductions from the gross receipts tax for sales of tangible personal property in interstate commerce, contrary to Sec. 72-16A-14 (H) for the period to time from July 1, 1967 to December 31, 1968.

"(g) The same contentions and protests correctly apply to City of Albuquerque Municipal Sales Tax.

". . . .

"(9) It is agreed by the parties:

". . . .

"(g) B.I.A. [Bureau of Indian Affairs] Contract No. 14-20-0650-1808 resulted in gross receipts of $103,852.00. This contract was performed at Isleta Pueblo, New Mexico. The contract was for a computer-mediated instruction project. Taxpayer was required to identify conceptual deficits, identify and select relevant audio-visual materials, and produce a computer program

to mediate between the deficits and the audio-visual materials. Taxpayer produced a complete educational program, wrote a final report, concept dictionary, film concept analysis, and miscellaneous items suitable for reproduction and reuse. $12,875.00 of the contract amount is solely for services. Deductions have been allowed for equipment left on the job site.

"(h) Typical of all other contracts with government agencies and the one contract with an exempt organization is the Department of Agriculture (Forest Service) contract of January 19, 1967. Under this contract were produced:

Camera-ready copies:

Manual entitled "Orientation to the Training Course for Engineers in the Forest Service—Presentation Package" (78 pages, 8 1/2" X 11") "Self-Administered Questions and Referral Section" (16 pages, 8 1/2" X 11")

Programed textbook entitled "Technical Orientation to the Forest Service Division of Engineering" (334 pages, 8 1/2" X 11")

Programed notebook entitled "Technical Orientation to the Forest Service Division of Engineering" (35 pages, 8 1/2" X 11")

Manuals entitled "Instructor's Guide" (17 pages, 8 1/2" X 11"), "Instructor's Handbook" (15 pages, 8 1/2" X 11"), "Discussion Questions" (6 pages, 8 1/2" X 11"), "Programed Notebook" (108 pages, 8 1/2" X 11")

Programed notebook and textbook (unitone through unit five, part four) entitled "Technical Orientation to the Forest Service Trans-

portation System" (670 pages, 8 1/2" X 11")
Magnetic Audio Tape
195 Photographic color slides
Although this contract is typical, not all contracts require the production of all items required by this contract.

"(i) Typical of all contracts with clients and customers which are neither government agencies nor exempt organizations is the I.B.M. [International Business Machines] contract of July 11, 1968. Under this contract were produced:

Camera-ready copies:

Manuals entitled "IBM 50 Magnetic Data Inscriber (Audio Course) For Experienced Card Punch/Verifier Operators—Illustrations" (22 pages, 8 1/2" X 11"), "Operator's Guide" (14 pages, 8 1/2" X 11"). Miscellaneous attachments (8 pages, 8 1/2" X 11")
Script for magnetic audio tape (45 pages, 8 1/2" X 11") and tape from script.

"(j) All contracts with both government agencies and other clients and customers of taxpayer were negotiated and entered into outside the State of New Mexico and all camera-ready copies, filmstrips, photographic slides, and magnetic audio tapes were delivered outside the State of New Mexico. Actual performance of contracts where tangible personal property was produced was in New Mexico.

"(k) Although taxpayer has the capability to actually publish and print the books and manuals it creates, its contracts here involved re-

quired only the production of camera-ready copies from which its clients or customers publish the books and manuals. The same is true of film-strip, slides, and magnetic audio tapes, where the original only is produced. The reproducible originals were not resold by the contracting party to whom they were delivered."

The portions of the Commissioner's order with which the taxpayer disagrees, and the validity of which is to be determined on this appeal, are:

"1. Although camera-ready copies and other reproducible items are tangible personal property which was produced as a result of each of taxpayer's contracts, taxpayer's sales to government agencies and exempt organizations were not sales of tangible personal property exempt under the Emergency School Tax and deductible under the Gross Receipts Tax, since the tangible property was merely incidental to the performance of services.

". . . .

"3. Taxpayer's gross receipts are not from the sale of interstate commerce and therefore exempt from the Emergency School Tax or deductible in computing the Gross Receipts Tax.

"4. Taxpayer's gross receipts are not exempt nor deductible for purposes of the City of Albuquerque Municipal Sales Tax for the same reasons that they are not exempt or deductible for purposes of the Emergency School Tax and the Gross Receipts Tax."

It is conceded by the parties that the taxpayer is liable for the Albuquerque Municipal Sales Tax only if liable to the State for a sales tax, or emergency school tax and gross receipts tax, and for the same reasons. The

taxpayer has abandoned its Point 3, under which it contended its gross receipts from sales to retail dealers, wholesalers and manufacturers were exempt from the emergency school tax as provided by § 72-16-14, N.M.S.A. 1953 (Repealed effective July 1, 1967) and the gross receipts tax as provided by § 72-16A-14(A) and (B), N.M.S.A. 1953 (1966 Interim Supp.) (Repealed effective July 1, 1969). Thus, our decision on the first two points asserted by the taxpayer will dispose of all issues presented by the appeal.

Under the first point, the taxpayer contends the contracts, under which it furnished the reproducible originals of books, manuals, films and magnetic audio tapes to government agencies and exempt organizations, constituted sales of tangible personal property. The Commissioner disagreed and levied the assessment on the theory that the contracts were for services, although the camera-ready copies and other reproducible items were admittedly tangible personal property created and produced by the taxpayer pursuant to the contracts. Neither the statutes nor any of the Commissioner's regulations define or offer any specific aid in determining what is meant in the statutes by tangible personal property. We agree with the position of the taxpayer.

This is a question of first impression in this jurisdiction, but has been presented under varying forms of tax statutes and varying circumstances, with varying results, in many other jurisdictions. These varying results cannot be fully reconciled in principle.

The Commissioner first contends the taxpayer is seeking an exemption, exception or deduction from the tax laws, and that statutes should be reasonably but narrowly construed against tax exemptions, exceptions, or deductions. He cites in support of this position McKee v. Bureau of

Revenue, 63 N.M. 185, 315 P.2d 832 (1957); Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1947); Peisker v. Unemployment Compensation Commission, 45 N.M. 307, 115 P.2d 62 (1941); Iden v. Bureau of Revenue, 43 N.M. 205, 89 P.2d 519 (1939). We agree with this principle of construction, but we also agree that taxing statutes should generally ". . . be given a fair, unbiased and reasonable construction, without favor either to the taxpayer or the state, to the end that the legislative intent is effectuated and the public interests to be subserved thereby furthered. . . ." Besser Company v. Bureau of Revenue, 74 N.M. 377, 394 P.2d 141 (1964).

Here, there is no question but what the agencies with which we are here concerned—agencies of the United States Government and the Research Foundation of the University of Toledo—are clearly exempt under the taxing statutes in question, and it has been so stipulated. The sole question is, therefore, whether or not the contracts between the taxpayer and these agencies for the creation, production and delivery of the reproducible originals of the books, manuals, films, magnetic audio tapes, and other items of tangible personal property constituted sales of tangible personal property, within the contemplation of the statutes, or were contracts for the performance of services, to which the items of tangible personal property were merely incidental.

The tax statutes in question clearly provided that sales of "tangible personal property" or the "selling of tangible personal property," to the agencies here involved should be exempt from the tax. The term "tangible personal property" is not defined in either Act, but, as already stated, it is admitted that the items in question were tangible personal property. There is also no question that the contracts required, as the ultimate acts of performance thereunder, the delivery to the agencies of these items of

tangible personal property. These items constituted the finished product contemplated by the contracts and were essential to the teaching, instructional and educational purposes for which they were intended. Their non-production, non-use or destruction would apparently defeat the ultimate objective of the entire contract under which they were created and furnished to the purchaser.

The fact that their value depended very largely upon the skills, learning, and technical abilities of the taxpayer, rather than the physical or tangible materials which went into their makeup, made them nonetheless tangible personal property subject to sale. See District of Columbia v. Norwood Studios, Inc., 336 F.2d 746 (D.C. Cir. 1964); Larey v. Dungan-Allen, Inc., 244 Ark. 908, 428 S.W.2d 71 (1968); Albers v. State Board of Equalization, 237 Cal. App.2d 494, 47 Cal.Rptr. 69 (1965), cert. denied, 383 U.S. 960, 86 S.Ct. 1226, 16 L.Ed.2d 302 (1966); People v. Grazer, 138 Cal.App.2d 274, 291 P.2d 957 (1965); Green v. Sgurovsky, 133 So.2d 663 (Fla. Ct. App. 1961); Community Telecasting Service v. Johnson, 220 A.2d 500 (Me. 1966); Mississippi State Tax Commission v. Hinton, 218 So.2d 740 (Miss. 1969); Hillman Periodicals, Inc. v. Gerosa, 285 App. Div. 441, 137 N.Y.S.2d 863, aff'd., 308 N.Y. 982, 127 N.E.2d 842 (1955); People ex rel. Walker Engraving Corporation v. Groves, 243 App.Div. 652, 276 N.Y.S. 674, aff'd., 268 N.Y. 648, 198 N.E. 539 (1935).

As above stated, the finished form of the items was essential to the use for which they were intended, and their great value to their purchasers, as the means of accomplishing the ultimate purposes of the contracts, depended on their existence in their finished form. Thus, as we view the principal objective of the agencies under their contracts, it was to secure from the taxpayer the finished items, and these finished items cannot logically be said to be

merely incidental to the performance of services. Clearly the purpose of the exemptions in the statutes was to exempt the United States, or any agency or instrumentality thereof, the State of New Mexico, or any subdivision thereof, non-profit schools, universities, hospitals, and religious or charitable organizations from the impact of the taxes in question. The adoption of the position taken by the Commissioner would result in the ultimate imposition of taxes, such as those here involved, upon the agencies and institutions which the Legislature clearly intended should be exempt therefrom, or result in the tax burden being shifted to other taxable customers of the taxpayer. Neither of these results would be consistent with the legislative intent. Shifting the tax burden would be inconsistent with the object of requiring a tax burden to fall with uniformity and equality upon the class of persons sought to be taxed. See New Mexico Electric Service Co. v. Jones, 80 N.M. 791, 461 P.2d 924 (Ct. App. 1969).

As already stated, we fully appreciate that other jurisdictions have taken what appears to be a position contrary in principle to that taken by us. For instance, see Bucyrus-Erie Company v. Lorenz, 26 Ill.2d 183, 186 N.E.2d 250 (1962). For a discussion and analysis of many of the cases dealing with the issues here presented, see Hellerstein, The Scope of the Taxable Sale Under Sales and Use Tax Acts: Sales as Distinguished From Services, 11 Tax Law Review 261, 261-288 (1955-56).

Under its second point, the taxpayer claims exemption from the taxes on its receipts under contracts with customers which were neither governmental agencies nor exempt institutions or organizations. As shown by the stipulated facts quoted above under Paragraph 9(i), the I.B.M. contract of July 11, 1968, is typical of these contracts, and the items of tangible personal property produced and de-

livered by the taxpayer to these customers, insofar as appears from the stipulation of facts, and insofar as material to the solution of the question now to be resolved, are similar to the items of tangible personal property considered under Point 1 above. Under Point 1, we held sales of similar tangible personal property to be exempt, because the statutes expressly provided for exemptions of such sales to the vendees there involved.

We are not here concerned with any such exemptions, and the fact that sales of tangible personal property were made under these contracts is not alone determinative of the issue now before us. The taxpayer claims exemption here upon the ground that the imposition of the taxes would constitute a tax upon interstate commerce. Paragraph 9(j) of the stipulation, as quoted, shows, and the taxpayer has so asserted in its brief in chief, that the contracts were negotiated and entered into outside the State of New Mexico, and the items of tangible personal property produced by the taxpayer pursuant to these contracts were delivered outside New Mexico. However, the actual performance of all work in the production of this property was accomplished by the taxpayer within New Mexico, where it maintains its principal office.

As we understand the stipulation relative to the assessment made by the Commissioner, and the briefs of the parties, the Commissioner seeks to assess taxes on the gross receipts of the taxpayer from these contracts. No effort has been made to apportion the overall services rendered and expenditures made in connection with negotiating and performing these contracts. Thus, we do not have a tax levied only on that portion of the gross receipts which can be attributed or allocated to the activities performed in New Mexico, as was the case in Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966), involving assessments under the Sales Tax,

or Emergency School Tax Act, which is one of the acts here involved.

As stated in the Bell Telephone Laboratories case, and in Dikewood Corporation v. Bureau of Revenue, 74 N.M. 75, 390 P.2d 661 (1964), this was a tax on the privilege of doing business in New Mexico. This tax act was repealed effective July 1, 1967, and was replaced by the Gross Receipts and Compensating Tax Act, which is the other act here involved. Sections 72-16A-1 to 19, N.M. S.A. 1953 (Repl. 10, pt. 2, Supp. 1969). The second section of this present act provides in part:

> "The purpose of the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico . . ."

There is no contention made by the taxpayer that its New Mexico activities fall outside the activities covered by the Act, except for the provision in § 72-16A-14.10 thereof that:

> "Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution."

Regulations adopted by the Commissioner on September 22, 1967, relative to the applicability of this section of the Act, are of no assistance in determining the question before us. On December 5, 1969, a new regulation, interpreting the applicability of this section, was adopted and provides:

> "Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where de-

livery is made out-of-state by seller's vehicle, U. S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller." G. R. Regulation 14.10-2.

It appears this interpretation of the statute would clearly exempt the gross receipts from the sales in question from the Gross Receipts and Compensating Tax Act, but we are not required to determine whether this regulation is an invalid attempt to negate § 72-16A-14.10, supra, because the regulation does not apply to the taxing period with which we are concerned.

The taxes here were imposed under both the Emergency School Tax Act, and the Gross Receipts and Compensating Tax Act, for the privilege of doing business in New Mexico. As stated in General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), and quoted in Bell Telephone Laboratories v. Bureau of Revenue, supra:

"'. . . [I]t is well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned.

"'A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . . .'"

As already stated, and as shown by the stipulation the taxpayer is a New Mexico corporation with its principal office in New Mexico, and the actual performance of all work in the production of the property provided for by the contracts here in question was accomplished within New Mexico. These in-state incidents are clearly sufficient as a basis for the levy by New Mexico of a gross receipts tax without doing violence to the interstate commerce clause of the federal constitution. See General Motors Corporation v. Washington, supra; Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); Norton Co. v. Department of Revenue, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951); Bell Telephone Laboratories v. Bureau of Revenue, supra.

As above stated, no effort has been made to impose the tax only upon that portion of the gross receipts which can be attributed to the activities performed within New Mexico. However, the taxpayer makes no complaint of this failure to apportion. Its position is that all of the gross receipts from the contracts under consideration are receipts from transactions in interstate commerce, that the imposition of the tax on any of these receipts is an unconstitutional burden on interstate commerce and that the taxpayer is, therefore, entitled to have all these gross receipts deducted, or exempt, from its taxable gross receipts, as provided in § 72-16A-14.10, supra. There is no showing in the record, and no argument is made, that there is a possibility of another state taxing, or attempting to tax, any receipts from, or activities incident to the performance of, these contracts. Thus, the question of multiple taxation, insofar as these contracts are concerned, is not before us, and, under these circumstances, the taxpayer has failed in its burden of showing an unconstitutional tax upon interstate commerce. See General Motors Corporation v. Washington, supra; Northwestern States

Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944).

It follows from what has been said that the order of the Commission dated October 28, 1969, insofar as it sought to impose a tax on the sales, or receipts from the sales, of tangible personal property to government agencies and exempt organizations, and insofar as the same is inconsistent with this opinion, must be reversed. Otherwise, the order should be affirmed.

IT IS SO ORDERED.

s/ LaFel E. Oman
Judge

We Concur:
s/ Joe W. Wood, J.
s/ William R. Hendley, J.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Tuesday, August 4, 1970

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

Final Order

This cause having heretofore been submitted and taken under advisement and an opinion of the Court having been handed down on the 28th day of May, 1970, and an application for Writ of Certiorari having been denied by the Supreme Court of the State of New Mexico on July 31, 1970:

IT IS, THEREFORE, ORDERED that the Order of the Court entered herein on the 28th day of May, 1970, reversing in part and affirming in part the judgment of the Commissioner of Revenue be and the same is hereby made final.

ATTEST: A true copy.

/s/ Hazel M. Chambers
Hazel M. Chambers, Clerk of the Court of Appeals of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Friday, July 31, 1970

No. 9096

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Respondent,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Petitioners.

Original Proceeding in Certiorari

This cause coming on before the Court for consideration on Petition for Writ of Certiorari directed to the Court of Appeals of the State of New Mexico, and the Court having considered said Petition and being sufficiently advised in the premises;

IT IS ORDERED that Petition for Writ of Certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 430 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A true copy.

/s/ Rose Marie Alderite
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 9096

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of New Mexico

The Attorney General of the State of New Mexico, as attorney for the Bureau of Revenue of the State of New Mexico, petitioner herein, respectfully petitions this Court for a Writ of Certiorari, pursuant to Section 16-7-14, N.M.S.A., 1953 Compilation and Rule 29 of the Rules of the Supreme Court, and as grounds therefor states that:

1. The petitioner seeks to have reviewed the decision of the Court of Appeals of the State of New Mexico in Evco v. Jones, Court of Appeals No. 430, issued May 28, 1970, wherein Petitioner was Appellee and Respondent was the Appellant, being a direct appeal to the New Mexico Court of Appeals pursuant to the provisions of the Tax Administration Act.

2. Both the Petitioner and Respondent made a motion for rehearing which motions were denied on July 7, 1970.

3. This case involves issues of substantial public interest that should be determined by this Court for the following reasons:

A. The decision of the Court of Appeals holding what historically has been considered the sale of services to be a sale of tangible personal property will result in a significant loss of revenue to the State of New Mexico; and

B. The decision of the Court of Appeals holding the Bureau of Revenue may apportion receipts from the sale of tangible personal property may well result in very substantial losses of revenue to the State of New Mexico and may result in an unconstitutional burden on interstate commerce.

4. The decision of the Court of Appeals is erroneous in the following respects:

A. The New Mexico Court of Appeals erroneously held that the sale of services by the Respondent constituted the sale of tangible personal property.

B. The New Mexico Court of Appeals incorrectly stated the law relating to interstate taxation of the sale of tangible personal property and improperly concluded that apportionment is possible under the facts set forth in the record before the Court.

5. The facts material to the questions presented above are as follows:

A. Taxpayer, doing business as Evco Instructional Designs, is a New Mexico corporation, engaged in business as a designer or creator of instructional or educational programs. Its employees are principally writers, artists, draftsmen, production typists and administrators. Certain of the employees are skilled in originating and designing educational materials. Taxpayer is equipped and staffed

to develop an educational idea all the way through to the finished product, which generally consists of reproducible originals of books, films, and magnetic audio tapes.

B. The Bureau of Revenue assessed gross receipts tax on certain contracts of the Respondent believing that they constituted the sale of services.

C. The nature of the contracts is set forth in part on pages 2 through 4 of the Court of Appeals' decision which has been attached to this Petition and by reference is hereby incorporated and made a part hereof.

6. In its opinion the Court of Appeals has failed to consider numerous relevant statutory provisions and regulations in arriving at its conclusion that the sales involved should be considered as sales of tangible personal property rather than the sale of services under our tax laws. These statutory provisions and regulations are discussed in Point I of Appellee's Brief in Support of Motion for Rehearing which has been attached to this Petition.

7. As pointed out in Point I of Appellee's Brief in Support of Motion for Rehearing, the Court of Appeals has overlooked the fact that New Mexico is one of the few states in the United States which broadly taxes the sale of services through the imposition of a gross receipts tax. Decisions of other states relied on by the Court of Appeals interpreting what would normally be considered as a sale of services under our law, as a sale of materials under the laws of other states, are wholly inapplicable.

8. The Court of Appeals has failed to properly consider the New Mexico Supreme Court's decision in *Bell Telephone Laboratories* v. *Bureau of Revenue*, 78 N.M. 78, 428 P.2d 617 (1966).

10. The theory of the New Mexico gross receipts tax is to tax as broadly as possible the sale of services to all governmental agencies. The New Mexico Court of Appeals has incorrectly concluded in its opinion that the legislature "clearly" exempted the United States government from taxation. By so concluding, the Court of Appeals has jeopardized a large source of revenue to the State of New Mexico at a time when our demands for new revenues are ever increasing. The decision of the Court of Appeals, if allowed to stand by this Court, will have very serious adverse consequences on an already narrow tax base.

11. Although the Petitioner Bureau of Revenue has apparently "won" the second point (pages 8 through 12 of the Court of Appeals decision) it joined the Respondent in filing a motion for rehearing on this point before the Court of Appeals asserting that the Court of Appeals has improperly stated the law relating to the taxation of interstate sales of tangible personal property. It should be emphasized that both Petitioner and Respondent believe that the Court of Appeals has erroneously decided this issue.

12. This case involves a significant question of law under the Constitution of the United States. If the decision of the Court of Appeals is allowed to stand on the issue of taxation of interstate commerce the theory asserted would undoubtedly eventually result in an unconstitutional burden on interstate commerce and in addition will result in significant losses of revenue to the State of New Mexico.

WHEREFORE, Petitioner herein prays for a Writ of Certiorari reviewing said decision of the Court of Appeals of the State of New Mexico and vacating the same.

Petitioner further prays that this Court allow further oral argument on the issues involved in the Evco appeal, as set forth above, and to render its decision thereon and prays for such other relief as may be just in this case.

/s/ James A. Maloney
James A. Maloney
Attorney General
/s/ Gary O'Dowd
Gary O'Dowd
Deputy Attorney General

AFFIDAVIT

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Gary O'Dowd, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Petitioner herein; that he has read the above and foregoing Petition for Writ of Certiorari; that the same is true to the best of his knowledge, information and belief, and that this Petition for Writ of Certiorari is not filed in this case for the purpose of delay, but that affiant believes that he has good cause for Certiorari.

/s/ Gary O'Dowd
Affiant

Subscribed and sworn to before me this 20th day of July, 1970.

/s/ Margaret Mae Sena
Notary Public
My Commission Expires: July 10, 1972.

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation d/b/a EVCO
INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO
Appellees.

Motion for Rehearing

Comes now the Appellees, by and through the Attorney General of the State of New Mexico, and request this Court that rehearing be granted by the Court for the following reasons:

1. That the Court of Appeals has incorrectly analyzed the purpose of the exemptions and deductions granted from gross receipts taxation to sales of tangible personal property to governmental agencies;

2. That the Court of Appeals has incorrectly stated the law as it concerns the apportionment of revenues, for taxation purposes, derived in part from sales in interstate commerce.

WHEREFORE, the Appellees respectfully pray that this Court grant a rehearing herein, and for such other relief as this Court may deem proper under the circumstances.

James A. Maloney
Attorney General
Richard J. Smith
Assistant Attorney General
Attorneys for Appellees

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

Motion for Rehearing

EVCO, Appellant herein, respectfully moves the Court, pursuant to Rule 18 of the Rules of the Supreme Court and Court of Appeals, for a rehearing in this cause with respect only to the second issue on appeal, in which the Court decided that taxpayer's gross receipts from sales of tangible personal property to purchasers outside the State of New Mexico were neither exempt from the Emergency School Tax nor deductible in computing the Gross Receipts Tax as being in interstate commerce.

Appellant submits that the same is erroneous for the reason that the same does not take into account that the imposition in this case of the taxes sought to be imposed would be unconstitutional as imposing a multiple burden on interstate commerce, and that such burden is imposed as shown by the facts in this case.

Appellant shows the Court that this motion does not renew contentions previously argued and submitted.

Respectfully submitted,

EVCO, a New Mexico corporation,
/s/ Kendall O. Schlenker
Schlenker & Parker, P.A.
P. O. Box 925
Albuquerque, New Mexico 87103
Gallagher & Walker
Suite 1222
Bank of New Mexico Building
Albuquerque, New Mexico 87101
Attorneys for Appellant

UNITED STATES OF AMERICA SS:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Court of Appeals of the State of New Mexico,

GREETINGS:

WHEREAS, lately in the Court of Appeals of the State of New Mexico, there came before you a cause between EVCO, a New Mexico Corporation, d/b/a EVCO Instructional Designs, appellant, and Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico and The Bureau of Revenue of the State of New Mexico, appellees, No. 430, wherein the judgment of the said Court of Appeals was duly entered on the twenty-eighth day of May A. D. 1970, as appears by an inspection of the petition for writ of certiorari and response thereto, which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari as provided by act of Congress.

AND WHEREAS, in the October Term, 1970, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the petition for writ of certiorari and the response thereto:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on May 17, 1971, by this Court that the judgment of the said Court of Appeals be vacated with costs, and that this cause be remanded to the Court of Appeals of the State of New Mexico for reconsideration in light of the position asserted by the Attorney General in the brief in opposition.

IT WAS FURTHER ORDERED that Evco dba Evco Instructional Designs, recover from Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico, One Hundred Dollars ($100) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness, the Honorable WARREN E. BURGER, Chief Justice of the United States, the sixteenth - - - - - day of June - - - - - in the year of our Lord one thousand nine hundred and seventy-one.

Costs of Evco dba Evco Instructional Designs:

Clerk's costs $100

/s/ E. Robert Seaver
Clerk of the Supreme Court
of the United States

No. 928

October Term, 1970
Evco dba Evco Instructional Designs,

v

Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico

(Filed June 21, 1971)

Filed: July 30, 1971

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

Kendall O. Schlenker
Schlenker & Parker, P. A.
Albuquerque, New Mexico
Gallagher & Walker
Albuquerque, New Mexico
Attorneys for Appellant
James A. Maloney
Attorney General
Richard J. Smith
Asst. Atty. Gen.
Santa Fe, New Mexico
Attorneys for Appellees

Opinion

OMAN, Justice.

The original opinion by this court in this cause appears in Evco v. Jones, 81 N.M. 724, 472 P.2d 987 (Ct. App. 1970). As shown by that opinion, two points were presented to this court for consideration and decision. The second of these points is the one with which we are primarily concerned, and our reconsideration thereof has

been occasioned by the following order entered on May 17, 1971 by the Supreme Court of the United States:

> "In view of the concessions made in the brief in opposition filed by the Attorney General of New Mexico, and on examination of the record, the petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals of the State of New Mexico for reconsideration in the light of the position asserted by the Attorney General in the brief in opposition. The Chief Justice, Mr. Justice Black, Mr. Justice Harlan, Mr. Justice Stewart are of the opinion that certiorari should be denied."

The following positions were taken by the Attorney General in its said brief in opposition and in oral argument before this court upon rehearing after the remand: (1) because we concluded in our original opinion that the contracts, under which the taxpayer created and furnished reproducible originals of books, manuals, films and magnetic audio tapes to out-of-state purchasers, constituted sales of tangible personal property, rather than contracts for services as contended by the Commissioner, the in-state incidents, or the New Mexico activities of the taxpayer in the performance of these contracts, could not be taxed under the New Mexico Gross Receipts Tax without doing violence to the interstate commerce clause of the Federal Constitution; and (2) because of our determination that these contracts constituted sales, rather than contracts for services, the administrative burdens in apportioning receipts from these contracts are made "immensely more difficult."

A resolution of the question, as to whether the State has exerted its power in proper proportion to the taxpayer's activities within the State and to its consequent enjoyment of the opportunities and protection which the

State has afforded, should not be dependent upon whether the contract under which the activities are performed is a contract of sale or a contract for services. The State may properly exact a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966). We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if the incidents arise out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale.

In our opinion taxable incidents are equally apparent and are ascertainable with equal ease whether they arise out of a contract of sale or out of a contract for services. In any event, the relative ease of ascertainment of taxable incidents should not be the primary consideration in determining the validity or invalidity of a tax law.

As pointed out in our prior opinion, there is no question of apportionment in this case, because no question of multiple taxation is involved. The burden of showing the unconstitutionality of a tax upon interstate commerce rests upon the taxpayer. General Motors Corporation v. Washington, supra. In this the taxpayer failed.

We reinstate and reaffirm our opinion in Evco v. Jones, supra.

IT IS SO ORDERED.

/s/ LaFel E. Oman
Justice, Supreme Court

WE CONCUR:

/s/ Joe W. Wood C.J.

/s/ William R. Hendley J.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Wednesday, September 29, 1971

No. 430

EVCO, a New Mexico Corporation, dba EVCO INSTRUCTIONAL DESIGNS,
Appellant,

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO AND THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

Final Order

This cause having heretofore been submitted and taken under advisement and an opinion of the Court having been handed down on the 30th day of July, 1971, motion for rehearing having been denied, and application for writ of certiorari having been denied,

IT IS, THEREFORE, ORDERED that the Order of the Court of Appeals entered herein on the 30th day of July, 1971, reinstating and reaffirming the opinion of this Court filed on May 28, 1971, in EVCO v. JONES, 81 N.M. 724, 472 P.2d 987, and remanding said cause to the Commissioner of the New Mexico Bureau of Revenue for such further proceedings as may be proper, if any, consistent and in

conformity with said opinion, be and the same is hereby made final.

cc: Schlenker & Parker
cc: Gallagher & Walker
cc: Attorney General

Attest: A true copy.

/s/ Hazel M. Davis
Clerk of the Court of Appeals of the State of New Mexico.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Wednesday, September 29, 1971

No. 9322

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, et al.,
Respondents.

Original Proceeding in Certiorari

This cause coming on before the Court for consideration on Petition for Writ of Certiorari directed to the Court of Appeals of the State of New Mexico, and the Court having considered said Petition and being sufficiently advised in the premises;

IT IS ORDERED that Petition for Writ of Certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 430 be and the same is hereby returned to the Clerk of the Court of Appeals.

Attest: True Copy

/s/ Rose Marie Alderite
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. .....

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

Application for Writ of Certiorari to the Court of Appeals of New Mexico

EVCO, by its attorneys, respectfully applies and petitions this Court for a Writ of Certiorari, pursuant to Sec. 16-7-14, N.M.S.A., 1953 Comp. and Rule 29 of the Rules of the Supreme Court, and as the grounds therefor states:

1. The petitioner seeks to have reviewed the decision of the Court of Appeals of the State of New Mexico in Evco v. Jones, Court of Appeals No. 430, issued July 30, 1971. Petitioner's Motion for Rehearing was denied August 24, 1971.

2. This is the second time the question presented for review has been before this Court upon Petition for Application for Writ of Certiorari.

Upon a direct appeal to the New Mexico Court of Appeals pursuant to the Tax Administration Act, the Court of Appeals issued its decision on May 28, 1970. Both petitioner and respondents filed Motions for Rehearing, which were both denied on July 7, 1970. Both parties then filed Petitions for Writ of Certiorari, which were denied by this Court on July 31, 1970. (No. 9096).

Petitioner then filed its Petition for Writ of Certiorari in the Supreme Court of the United States. This Petition was granted, resulting in reconsideration by the Court of Appeals and the decision, Motion for Rehearing and the denial thereof, all referred to above.

3. The question presented for review is:

Whether taxpayer's gross receipts from sales to customers other than government agencies and nonprofit organizations were exempt from the emergency school tax and deductible in computing the gross receipts tax as being in interstate commerce.

4. The facts material to the question presented have been fully developed by Stipulation of the parties and by the prior decisions of the Court of Appeals. Essentially, petitioner produces or creates tangible personal property which it sells to customers outside the State of New Mexico, and which are delivered to such customers outside the State of New Mexico.

5. Petitioner asserts that if the receipts from such property were not exempt from the emergency school tax, and were not deductible in computing the gross receipts tax, such taxes impose an unconstitutional burden on interstate commerce.

6. The question was presented to the Court of Appeals as Point II in Appellant's Brief-in-Chief, page 22, on the direct appeal. It was also presented in all subsequent pleadings and hearings in the New Mexico Court of Appeals, the New Mexico Supreme Court, and the Supreme Court of the United States.

WHEREFORE, petitioner prays for the grant of a Writ of Certiorari reviewing said decision of the Court of Appeals of the State of New Mexico and vacating the same with respect to the question herein presented.

Respectfully submitted,

EVCO, a New Mexico corporation
Schlenker & Parker, P.A.
P. O. Box 925
Albuquerque, New Mexico 87103
Gallagher & Walker
Suite 1222, Bank of New Mexico Building
Albuquerque, New Mexico 87101
Attorneys for Petitioner

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

Motion for Rehearing

EVCO, Appellant herein, respectfully moves the Court pursuant to Rule 18 of the Rules of the Supreme Court and Court of Appeals, for a rehearing in this cause with respect only to the second issue on appeal, in which the Court decided that taxpayer's gross receipts from sales of tangible personal property to purchasers outside the State of New Mexico were neither exempt from the Emergency School Tax nor deductible in computing the Gross Receipts Tax as being in interstate commerce.

Appellant submits that the same is erroneous for the reason that the same does not take into account that the imposition in this case of the taxes sought to be imposed would be unconstitutional as imposing a multiple burden on interstate commerce, and that such burden is imposed as shown by the facts in this case.

Appellant shows the Court that this motion does not renew contentions previously argued and submitted.

Respectfully submitted,

EVCO, a New Mexico corporation,
/s/ Kendall O. Schlenker
Schlenker & Parker, P.A.
P. O. Box 925
Albuquerque, New Mexico 87103
Gallagher & Walker
Suite 1222
Bank of New Mexico Building
Albuquerque, New Mexico 87101
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Tuesday, August 24, 1971

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

This cause coming on for hearing upon Appellant's motion for a rehearing, and the Court having considered said motion and briefs of counsel, and being now sufficiently advised in the premises,

IT IS ORDERED that said motion for rehearing be and the same is hereby denied.

ATTEST: A true copy.

/s/ Hazel M. Davis
Clerk of the Court of Appeals
of the State of New Mexico

FILE COPY

FILED
APR 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-857

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR THE PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-857

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR PETITIONER

Evco, a New Mexico corporation, d/b/a/ Evco Instructional Designs, Petitioner, herewith submits its brief in support of the Writ of Certiorari to the Court of Appeals of the State of New Mexico.

OPINIONS BELOW

The first opinion in *Evco* v. *Jones, et al.*, is reported in 81 N.M. 724, 472 P.2d 987 (1970). Writ of Certiorari to the Court of Appeals of the State of New Mexico was granted in No. 928, October Term, 1970. 402 U.S. 969, 91 S. Ct. 1655, 29 L.Ed. 2d 134 (1971). The second opinion of the Court of Appeals of the State of New Mexico is reported in 83 N.M. 110, 488 P.2d 1214 (1971). Both opinions and the Writ of Certiorari appear in Appendix B of the Petition for Writ of Certiorari filed herein.

JURISDICTION

The Court of Appeals of the State of New Mexico on remand, rendered the Judgment by Opinion on July 30, 1971. Rehearing was denied August 24, 1971. Application for Writ of Certiorari was denied by the Supreme Court of the State of New Mexico on September 29, 1971. Thereupon, the Final Order was entered by the Court of Appeals of the State of New Mexico on September 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATUTES, RULES AND REGULATIONS INVOLVED

The statutory provisions involved are Art. I, Sec. 8, Cl. 3 of the United States Constitution; and Sec. 72-16A-14.10, N.M.S.A., 1953 Comp. (July 1, 1967). New Mexico Bureau of Revenue G. R. Regulation 14.10-2 is involved as representing the Bureau's subsequent interpretation of the question presented herein.

QUESTIONS PRESENTED

(1) Whether Petitioner's gross receipts from sales of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are exempt from New Mexico Emergency

School Tax and New Mexico Gross Receipts Tax as being sales of interstate commerce.

STATEMENT

Direct appeal to the Court of Appeals of the State of New Mexico was taken by Petitioner taxpayer from a written order of Respondent Commissioner of Revenue, pursuant to Sec. 16-17-8 (F), N.M.S.A., 1953 Comp. (Supp. 1969), and Sec. 72-13-39, N.M.S.A., 1953 Comp. (Repl. 10, pt. 2, Supp. 1969). The case was presented to the lower Court upon a Stipulation of Facts.

In its opinion the lower Court decided that Petitioner was involved in the production or creation of tangible personal property, and that sales thereof to the United States, the State of New Mexico, their departments and instrumentalities, and sales to certain non-profit organizations, were exempt from the Emergency School Tax Act and the Gross Receipts Tax Act, by virtue of Sec. 72-16-5, N.M.S.A., 1953 Comp., and Sec. 72-16A-14.G, N.M.S.A., 1953 Comp.

In its opinion the Court further held that Petitioner's gross receipts from sales of such tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are not exempt from the Emergency School Tax Act and the Gross Receipts Tax Act as being sales in interstate commerce. On June 17, 1970, both Petitioner and Respondent filed Motions for Rehearing. Both Motions for Rehearing were denied on July 7, 1970. On July 20, 1970 Respondent filed a Petition for Writ of Certiorari to the Court of Appeals of New Mexico in the Supreme Court of New Mexico. Petitioner filed its Response to Petition for Writ of Certiorari-Petition for Writ of Certiorari. The Supreme Court entered its Order denying both Petitions for Writ of Certiorari on July 31, 1970. Thereupon, the Final Order of the Court of Appeals was entered August 4, 1970.

Although Respondent in its Motion for Rehearing and Petition for Writ of Certiorari continued to assert its position that the subject matter of Petitioner's sales was the sale of "services" rather than the sale of "tangible personal property," Respondent joined Petitioner in asserting that if the sales were of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, Petitioner's gross receipts from such sales are exempt from Emergency School Tax and Gross Receipts Tax as being sales in interstate commerce.

The New Mexico Attorney General in his Brief in Opposition to Petition for Writ of Certiorari in No. 928, stated:

> "While this document is entitled 'Brief in Opposition', Respondents wish to make it clear that they agree with Petitioner's position concerning the incorrectness of the New Mexico Court of Appeals decision on the second issue involved in Evco v. Jones, 81 N.M. 724, 472 P.2d 987 (1970)."

This Court, in its Writ of Certiorari ordered:

> ". . . that the judgment of the said Court of Appeals be vacated with costs, and that this cause be remanded to the Court of Appeals of the State of New Mexico for reconsideration in light of the position asserted by the Attorney General in the Brief in Opposition."

Upon the remand, the Court of Appeals of the State of New Mexico required further oral argument, and subsequently entered a new opinion, which concluded as follows:

> "We reinstate and reaffirm our opinion in Evco v. Jones, supra."

Both Petitioner and Respondents asserted the same position before this Court and upon the remand to the Court of Appeals of the State of New Mexico. Upon the subsequent Petition for Writ of Certiorari, the Attorney General of New Mexico responded to the Clerk of this Court:

> "I notify you that a Brief in Opposition to any Petition for Writ of Certiorari in the above-referenced cause will not be filed, because the Respondent does not oppose the Petition for Writ of Certiorari."

ARGUMENT

I.

Petitioner's Gross Receipts from Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery Is Made Outside the State of New Mexico, Are Exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax As Being Sales in Interstate Commerce.

Both the question presented and the applicable facts are set forth by the Court of Appeals in its first opinion as follows:

> "The taxpayer claims exemption here upon the ground that the imposition of the taxes would constitute a tax upon interstate commerce. Paragraph 9(j) of the Stipulation, as quoted, shows, and the taxpayer has so asserted in its Brief in Chief, that the contracts were negotiated and entered into outside the State of New Mexico, and the items of tangible personal property produced by the taxpayer pursuant to these contracts were delivered outside New Mexico. However, the actual performance of all work in the production of

this property was accomplished by the taxpayer within New Mexico, where it maintains its principal office."

The Emergency School Tax Act, which was in effect during the first part of the taxable period, contains no provision with respect to exemption of transactions in interstate commerce. Likewise, the regulations thereunder contain no such provision.

For the taxable period after July 1, 1967, the Gross Receipts Tax Act provides:

"Sec. 72-16-A-14.10. Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution."

The Bureau of Revenue regulations promulgated under Sec. 72-16A-14.10 contained nothing specific with regard to either "inshipments" or "outshipments."

On December 5, 1969, after the close of the taxing period specifically involved, the Bureau of Revenue adopted a new regulation, interpreting the applicability of this section, as follows:

"Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where delivery is made out-of-state by seller's vehicle, U. S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller." G.R. Regulation 14.10-2.

Of this subsequent regulation the Court of Appeals stated:

"It appears this interpretation of the statute would clearly exempt the gross receipts from the sales in question from the Gross Receipts and Compensating Tax Act, but we are not required to determine whether this regulation is an invalid attempt to negate §72-16A-14.10, supra, because the regulation does not apply to the taxing period with which we are concerned."

The Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3, delegates to Congress the power "... to regulate commerce with foreign nations, and among the several states." Since the Constitution says nothing further with regard to what constitutes a regulation of interstate commerce, this determination has been worked out in a long series of decisions of this Court. It is submitted that the case of *J. D. Adams Manufacturing Co.* v. *Storen, et al.*, 304 U.S. 307, 58 S. Ct. 913, 82 L.Ed. 1365 (1938), is controlling in this case.

In *Adams Manufacturing Co.*, the State of Indiana attempted to impose a privilege tax measured by gross receipts upon a corporation engaged in the business of manufacturing road machinery in Indiana, and selling its products both within Indiana and in other states. The tax in question, which was described as a privilege tax upon the receipts of gross income from sales, was held to be void under the Commerce Clause. This Court explained that there are constitutionally permissible methods by which a state can exact compensation for business activities occurring within its boundaries, such as an excise tax on manufacturing, but that a privilege tax on sales to persons located outside the state is not one of them. In *Adams Manufacturing Co.*, there is a suggestion that the tax might have been constitutional if it had been apportioned, 304 U.S. 307, 314. This suggestion has not been followed in subsequent decisions of any courts, unless it is

being followed without citation by the Court of Appeals of New Mexico in this case. To the contrary, in *Freeman* v. *Hewitt*, 329 U.S. 249, 67 S. Ct. 274, 91 L.Ed. 265 (1946), a decision voiding the imposition of the same Indiana tax upon the receipts of an Indiana seller from the sale of securities through the New York Stock Exchange, the apportionment concept, as applied to receipts from selling, appears to be discarded. See *Freeman* v. *Hewitt*, supra, at p. 259 (Rutledge, J., concurring).

Chapter 34, "State Taxation of Interstate Commerce," The Report of the Special Subcommitte on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, pp. 1037-61 (June 30, 1965) analyzes the decisions of the entire subject area. In a section entitled "The Taxability of Sales of Goods Shipped out of the State," the Report concludes apparently upon the basis of *Adams Manufacturing Co.*:

> "Only if a tax is imposed on manufacturing, producing, or extracting may gross receipts from goods shipped out of the State be included in the measure of the tax. Otherwise, the State of origin may not tax outshipments." Supra, 1039.

In a per curiam opinion, this Court has held that Utah could impose a sales tax upon in-state sales, where the purchaser picked up the property in Utah and transported it out of state. Taxation of this transaction was considered constitutional since the passage of title and delivery took place within the State of Utah. *Utah Tax Commission* v. *Pacific States Cast Iron Pipe Co.*, 372 U.S. 605, 83 S. Ct. 925, 10 L.Ed. 2d 8 (1963).

Relying upon the *Adams Manufacturing Co.* case, the U. S. Court of Appeals for the Ninth Circuit has voided the imposition of a gross receipts tax by the Territory of Guam

upon receipts from sales of automobile parts to a purchaser located in the Philippines. Although the contract of sale was negotiated in Guam, delivery was to be made by the seller in the Philippines. *Manila Trading & Supply Co.* v. *Maddox*, 335 F.2d 150 (9th Cir., 1964).

In refusing to change its opinion upon the remand, the Court of Appeals of New Mexico first notes its determination that the taxpayer was involved in making sales of tangible personal property rather than in performance of services. It then goes on to state:

> "A resolution of the question, as to whether the State has exerted its power in proper proportion to the taxpayer's activities within the State and to its consequent enjoyment of the opportunities and protection which the State has afforded, should not be dependent upon whether the contract under which the activities are performed is a contract of sale or a contract for services. The State may properly exact a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. General Motors Corporation v. Washington, 377 U.S. 436, 84 S. Ct. 1564, 12 L.Ed.2d 430 (1964); Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966). We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if the incidents arise out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale."

In the *Bell Telephone Laboratories* case, it was held that the Emergency School Tax could be imposed upon a foreign corporation's receipts derived from military contracts for the construction of missile systems, even though the only work performed in New Mexico in fulfilling these

contracts was their testing. The New Mexico Supreme Court determined that the Commerce Clause of the U. S. Constitution was not violated because testing was a separable activity, and the tax was imposed only upon those receipts derived from testing in New Mexico. The activities involved were clearly performance of services.

In the *General Motors Corporation* case, this Court held that although a tax measured by gross receipts is invalid unless it is fairly apportioned to the taxing state, the Washington business and occupation tax was not unfairly related to the taxpayer corporation's numerous and complex operations in Washington. The tax was imposed upon "inshipments" rather than "outshipments." The taxpayer sought to avoid the tax upon its claim that it would be subjected to multiple taxation. However, it failed to show a definite burden of taxation, in a constitutional sense, either by St. Louis or the State of Oregon.

Petitioner has found no recent decisions relating to constitutionality of tax on "outshipments." Respondents suggested in a brief below that perhaps this could be explained by the fact that most states have assumed that they were without power to tax sales of goods where delivery occurs outside the state, and that such states have accepted these transactions from the general operation of their taxing statutes. This appears also to be what New Mexico has done with respect to G. R. Regulation 14.10-2, supra, which regulation appears to be based upon the clear authority of this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Writ of Certiorari which has been granted herein specifically reverse the Court of Appeals of the State of New Mexico, and that this Court specifically direct that final judgment be entered pursuant to the decision of this Court.

Respectfully submitted,

KENDALL O. SCHLENKER
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FILE COPY

IN THE

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OCTOBER TERM, 1971

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EVCO, a New Mexico Corporation, d/b/a INSTRUCTIONAL DESIGNS, *Petitioner*,

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On Writ of Certiorari to the Court of Appeals of the State of New Mexico

BRIEF FOR THE RESPONDENTS

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On Writ of Certiorari to the Court of Appeals of the State of New Mexico

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BRIEF FOR THE RESPONDENTS

STATUTES AND REGULATIONS INVOLVED

In addition to the statutory provisions and regulations cited by Petitioner, Respondents consider the following statutory provisions and regulations are involved in this case: Section I of the Fourteenth Amendment to the United States Constitution; § 72-16-4.3, subparagraph C, N.M.S.A. 1953 of the Emer-

gency School Tax Act [N.M. Laws of 1963, chapter 325, § 2]; § 72-16-4.9, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, chapter 325, § 7]; § 72-16-5, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, chapter 239, § 1 and N.M. Laws of 1966, chapter 59, § 1]; § 72-16A-3, subparagraph E of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-3, subparagraph F, of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-3, subparagraph J of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-14, subparagraph G of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-14, subparagraph L, of the Gross Receipts and Compensating Tax Act, effective July 1, 1967; § 72-16A-14.12, N.M.S.A. 1953 (Supp. 1971) of the Gross Receipts and Compensating Tax Act, effective July 1, 1969; § 72-16A-14.30, N.M.S.A. 1953 (Supp. 1971) of the Gross Receipts and Compensating Tax Act, effective July 1, 1970; Gross Receipts and Compensating Tax Act Regulation 14-2(B)-2, omitting examples, effective September 22, 1967; Gross Receipts and Compensating Tax Act Regulation 3(J)-1, example (A), effective September 22, 1967; and Emergency School Tax Regulation 4.10-2, effective July 14, 1964. These statutes and regulations are quoted in Appendix A.

QUESTIONS PRESENTED

(1) Was the New Mexico Court of Appeals correct in determining that Petitioner's sales were sales of tangible personal property and was it in violation of § 1 of the Fourteenth Amendment to the United States Constitution to consider Petitioner's sales as sales of services?

(2) If Petitioner's sales were sales of tangible personal property, were Petitioner's gross receipts from the sale of this property to buyers outside New Mexico, when delivery is made outside New Mexico, exempt or deductible from taxes imposed by the New Mexico Emergency School Tax Act and New Mexico Gross Receipts and Compensating Tax Act because of Article I, § 8 of the United States Constitution?

SUMMARY OF ARGUMENT

The New Mexico Court of Appeals, because of its decision that Petitioner was selling tangible personal property rather than performing services, has raised an issue concerning the taxability of receipts from "outshipments" of tangible personal property under Article I, § 58, of the United States Constitution. The lower court, in deciding that Petitioner was not performing services, misconstrued the intent of the New Mexico Legislature regarding the taxability of services performed for the United States government and certain non-profit organizations and also misconstrued the requirements of § 1 of the Fourteenth Amendment to the United States Constitution. The Bureau of Revenue does not contest the argument that receipts from "outshipments" of tangible personal property are exempt or deductible from the taxes at issue here under Article I, § 8, of the United States Constitution; however, we do argue that it is not necessary to reach that issue if Petitioner's receipts are determined to be receipts from performing services.

ARGUMENT

I

Petitioner's Gross Receipts Were From the Performance of Services in New Mexico and Were Subject to Emergency School Tax and Gross Receipts Tax. The Commissioner of Revenue's Decision Concerning This Matter Was Supported by Substantial Evidence, Reflected the Intent of the New Mexico Legislature and Was Not Contrary to the Requirements of § 1 of the Fourteenth Amendment of the United States Constitution.

In its first opinion, the Court of Appeals, in deciding that Evco was selling tangible personal property rather than performing services, stated:

> "... Clearly the purpose of the exemptions in the statutes was to exempt the United States, or any agency or instrumentality thereof, the State of New Mexico, or any subdivision thereof, non-profit schools, universities, hospitals, and religious or charitable organizations from the impact of the taxes in question. The adoption of the position taken by the Commission would result in the ultimate imposition of taxes, such as those here involved, upon the agencies and institutions which the Legislature clearly intended should be exempt therefrom, or result in the tax burden being shifted to other taxable customers of the taxpayer. Neither of these results would be consistent with the legislative intent. Shifting the tax burden would be inconsistent with the object of requiring a tax burden to fall with the uniformity and equality upon the class of persons sought to be taxed. See *New Mexico Electric Service Co.* v. *Jones,* 80 N.M. 724, 729, 472 P. 2d 987, 992 (Ct. App. 1970).

The exemption the lower court speaks of would, in the context of the case, have to be the exemption and deduction provided in § 72-16-5, N.M.S.A. 1953 of the Emergency School Tax Act and § 72-16A-14(G) and

(L), N.M.S.A. 1953 of the Gross Receipts and Compensating Tax Act. (Appendix A, *infra,* pp. 18, 19). These sections refer only to receipts from sales of "tangible personal property" and not to receipts from the performance of services. The result of the court's interpretation is to render the distinction between "property" and "services" made in both the Emergency School Tax Act and Gross Receipts and Compensating Tax Act surplusage or superfluous. This distinction is clearly and carefully drawn on both Acts.

In the Emergency School Tax Act, a specific section appears to impose tax on the type of activity which resulted in Evco's gross receipts that being a, ". . . service rendered [which] is of a professional, technical, or scientific nature . . . ." Section 72-16-4.9, N.M.S.A. 1953 (Appendix A, *infra,* p. 17). Although the Emergency School Tax Act did not refer to property which was transferred incidental to the performance of services, the regulations promulgated by the Bureau of Revenue to interpret that Act recognized that transfers of this type occurred in most transactions involving the performance of services and stated in part, ". . . Where the taxpayer must use tangible personal property in the performance of his service, he must compute his school tax under § 72-15-4.10 on the total receipts derived from the performance of the service and gross proceeds of sales of tangible personal property unless the industry of which he is a part has a common practice of billing material and labor separately." Emergency School Tax Regulation 4.10-2 (Appendix A, *infra,* p. 21).

The Gross Receipts and Compensating Tax Act, which became effective July 1, 1967, also specifically

separated the performance of services as a separate and distinct activity from the sale of property. It also indicated that the performance of services could include the transfer of property. In defining "service", the Act stated that it involved ". . . primarily the performance of a service as distinguished from selling property." Section 72-16A-3(J.), N.M.S.A. 1953 (Supp. 1967) (Appendix A, *infra,* p. 19). The Bureau of Revenue, by regulation, interpreted this to mean that receipts from performing services included ". . . amounts for sales of tangible personal property used in the performance of the service . . . ." Gross Receipts and Compensating Tax Act Regulation 14-2(B)-2 (Appendix A, *infra,* p. 20). See Gross Receipts and Compensating Tax Act Regulation 3(J)-1, example (A) (Appendix A, *infra,* p. 21).

With these regulations as a basis for interpretation, along with the facts that the taxpayer was engaged in business as a designer or creator of educational programs and engaged in the activities described in paragraph (9), subparagraphs (a), (h), (i), and (k) of the stipulation of facts (quoted in *Evco* v. *Jones,* 81 N.M. 724, 726, 727, 472 P. 2d 987, 989, 990 (Ct. App. 1970), it is apparent that there was substantial evidence to support the Commissioner's decision that Evco's receipts were from the performance of services.

The regulations of the Bureau of Revenue should be a reinforcing value to the Commissioner's decision. Compare *Fox* v. *Standard Oil Co. of New Jersey,* 294 U.S. 87, 96, 55 S. Ct. 333, 337, 79 L. Ed. 780 (1935), and Sutherland, *Statutory Construction,* § 6709, Vol. 3, 3rd Ed. (1943). In *Washington Times-Herald, Inc.* v. *District of Columbia,* 213 F. 2d 23 (D.C. Cir. 1954), the court found that the disregard by the Tax Court of a

finding of fact contrary to an implementing regulation regarding a distinction between services and tangible personal property was a reversible error.

The re-enactment by the New Mexico Legislature of the definition of "service" in 1969, § 72-16A-3(K), N.M.S.A. 1953 (Supp. 1971), indicates an intention on the part of the Legislature to agree with the prior regulations of the Bureau of Revenue. Compare *Commissioner of Internal Revenue* v. *Noel,* 380 U.S. 678, 682, 85 S.Ct. 1238, 14 L. Ed. 2d 159, 162, and Sutherland, *Statutory Construction, supra.*

The Bureau of Revenue contends that it is clear that the intent of the New Mexico Legislature was not to exempt or grant a deduction to sellers of services to the United States or its agencies or instrumentalities or to certain non-profit organizations when those sales involved the incidental transfer of tangible personal property. In *Bradbury & Stamm Construction Co.* v. *Bureau of Revenue,* 70 N.M. 226, 232, 233, 372 P. 2d 808, 813, 814 (1962), the New Mexico Supreme Court explained the reasons underlying the amendment to § 72-16-5 of the Emergency School Tax Act, contained in N.M. Laws of 1961, chapter 191, § 1, which excluded an exemption for sales of services to the State of New Mexico. The indications are clear that the Legislature intended to place a tax on the receipts of persons performing service for the United States and was aware that this tax was constitutionally acceptable because the legal incidence of the tax was on the person performing the service. See *Alabama* v. *King & Boozer,* 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, 140 A.L.R. 615 (1941), and *James* v. *Dravo Contracting Company,* 302 U.S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 A.L.R. 318 (1937). Both the Emergency School Tax Act and

Gross Receipts and Compensating Tax Act impose the taxes at issue here on the *seller,* not on the buyer.

In 1969, the New Mexico Legislature enacted § 72-16A-14.12, N.M.S.A. 1953 (Supp. 1971) (Appendix A, *infra,* p. 20). That section provided for a deduction for the sale of certain services and required the buyer to ". . . make initial use of the *product of the service* outside New Mexico." (emphasis supplied) This statute is another indication of the recognition of the New Mexico Legislature that performance of services is accompanied by the transfer of tangible personal property. Another, similar indication is found in § 72-16A-14.30, N.M.S.A. 1953 (Supp. 1971) (Appendix A, *infra,* p. 20), which became effective July 1, 1970.

The fact that other jurisdictions have determined that the production and transfer of items similar to the tangible personal property, in the form of "camera-ready copies", at issue here should be considered in view of the absence in those jurisdictions of a broad tax on services such as New Mexico has. In each of the cases relied on by the court in *Evco* v. *Jones,* 81 N.M. 724, 472 P.2d 987 (Ct. App. 1970), for the proposition that the receipts at issue here were from the sale of tangible personal property it should be noted that in order for the transaction in issue to be taxable it was necessary that it be classified as a transfer of property rather than the performance of a service. See *District of Columbia* v. *Norwood Studios, Inc.,* 118 U.S. App. D.C. 358, 336 F.2d 746 (1964); *Larey* v. *Duggan-Allen, Inc.,* 244 Ark. 908, 428 S.W.2d 71 (1968); *Albers* v. *State Board of Equalization,* 237 Cal.App.2d 494, 47 Cal. Rptr. 69 (1965), cert. denied, 383 U.S. 960, 86 S.Ct. 1226, 16 L.Ed.2d 302 (1966);

People v. *Grazer,* 138 Cal.App. 2d 274, 291 P.2d 957 (1965); *Green* v. *Sgurousky,* 133 So.2d 663 (Fla.Ct. App. 1961); *Community Telecasting Service* v. *Johnson,* 220 A.2d 500 (Me. 1966); *Mississippi State Tax Commission* v. *Hinton,* 218 So.2d 740 (Miss. 1969); *Hillman Periodicals, Inc.* v. *Gerosa,* 285 App.Div. 441, 137 N.Y.S.2d 863, aff'd, 308 N.Y. 982, 127 N.E.2d 842 (1955); and *People ex rel. Walker Engraving Corporation* v. *Groves,* 243 App.Div. 652, 276 N.Y.S. 674, aff'd, 268 N.Y. 648, 198 N.E. 539 (1935). It would seem to be a reasonable assumption that the agency administering the tax statutes in the above cited cases would tend toward extension of the transactions subject to tax by extension into transactions which might otherwise be considered performance of services. The stage or level in the economic process at which the tax is imposed effect the amount of tax extracted. See Hellenstin, J. R., *The Scope of the Taxable Sale Under Sales and Use Tax Acts: Sales or Distinguished from Services,* 11 Tax Law Rev. 261, 273 and 274 (1956). It is also likely that the court deciding the above cited cases gave some weight to administrative determinations regarding the nature of the transactions at issue, whether or not it is explicitly indicated in their opinions.

Department of Treasury of State of Indiana v. *Ingram-Richardson Manufacturing Company of Indiana,* 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 13113 (1941), is a case presenting issues similar to those present here. Indiana's Gross Income Tax Law imposed a tax on gross receipts from performing services in Indiana. The taxpayer enameled stove and refrigerator parts belonging to its out-of-state customers at its factory in Indiana. Indiana imposed its tax on this activity as gross receipts from performing services and its

position was sustained even though the enameled parts were sent outside Indiana. The court stated:

> "... Here, on the contrary, the entire service was in aid of the enameling business conducted within the state. The transportation of the metal parts to and from Indiana were but incident to that intrastate business, as was the circulation of appellant's magazine in States other than the taxing State in the Western Livestock Case, *supra*." [*Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944 (1938)]

It seems apparent that the delivery of the enameled parts to out-of-state customers was essential to the contract between the taxpayer and its customers and that, to quote the court below in this case, "Their non-production, non-use or destruction would apparently defeat the ultimate objective of the entire contract under which they were created and furnished to the purchaser." However, it was determined that such sales were sales of services.

The reasoning of the Court of Appeals regarding the shifting of the tax burden and the possible result that the tax burden would not fall with uniformity and equality upon the class of persons sought to be taxed, if the activity engaged in by the taxpayer was considered a service, relies on an erroneous construction of the requirement of the equal protection provision of § 1, of the Fourteenth Amendment to the United States Constitution. The case relied on by the lower court for support of its reasoning is *New Mexico Electric Service Company* v. *Jones*, 80 N.M. 791, 461 P.2d 924 (Ct. App. 1969). See *Evco* v. *Jones*, 81 N.M. 724, 729, 472 P.2d 987, 992 (Ct. App. 1970). In the *New Mexico Electric Service Company* case, the taxpayer

argued that the equal protection provisions of the United States Constitution and the New Mexico Constitution (Article II, § 18) were violated if a repealed deduction for federal income tax from "base income", as defined in the New Mexico Income Tax Act, was not allowed to fiscal year taxpayers whose taxable years included a portion of the year prior to the date the deduction was repealed. The Court of Appeals stated that they did not express or suggest opinion on that argument; however, in their opinion, the court explained that the relevant statutory provision accomplished the required equity and uniformity in the imposition of the tax.

There is no factual support that Evco would have been unable to "pass on" the gross receipts tax imposed on it to its buyers, regardless of who these buyers were. The incidence of the tax was clearly upon Evco, not buyers from Evco. There was no showing that Evco was treated differently from the broad class of persons providing services. A tax on Evco's services performed in New Mexico would not infringe on its rights under § 1 of the Fourteenth Amendment to the United States Constitution. Compare *Atlantic Coast Line R. Co.* v. *Doughton,* 262 U.S. 413, 43 S.Ct. 620, 67 L.Ed. 1051 (1923), and *Bowman* v. *Continental Oil Co.,* 256 U.S. 642, 41 S.Ct. 606, 65 L.Ed. 1139 (1921).

In considering this matter, the Bureau of Revenue wishes to point to a statement of Mr. Justice Jackson in *Norton* v. *Department of Revenue,* 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951), as particularly applicable in this case. The statement follows:

> "Of course, in constitutional cases, we have power to examine the whole record to arrive at independ-

> ent judgment as to whether constitional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence." (340 U.S. 534, 538, 95 L.Ed. 517, 521).

The Court of Appeals considered the question of whether the activity engaged in by Evco resulted in the performance of services or the sale of property, as a question of law. It has been argued that this question was decided on erroneous grounds; however, the Bureau of Revenue also contends that this question was not a question of law but a question of fact. The Commissioner of Revenue had substantial evidence before him to support his decision that the activity engaged in by Evco was the performance of a service. If examination of the whole record in this case is made, it becomes apparent that the Court of Appeals' decision should be reversed and the Commissioner's decision reinstated. Such a result would not invade any of Evco's constitutional rights.

II

If Petitioner's Gross Receipts Were From Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery Is Made Outside the State of New Mexico, These Receipts Are Exempt From New Mexico Emergency School Tax and New Mexico Gross Receipts Tax as Sales in Interstate Commerce.

If Evco's gross receipts are determined to have been receipts from selling tangible personal property rather than performing services, the Bureau of Revenue is in agreement with the argument presented by Evco in its brief on the merits. This position has been maintained by the Bureau of Revenue before the New Mexico Court of Appeals in its brief in support of its motion for rehearing to the Court of Appeals, its petition to

the New Mexico Supreme Court for writ of certiorari to the Court of Appeals (Appendix B, pp. A19 to A23, of the Petition for Writ of Certiorari filed herein), and in oral argument before the Court of Appeals upon rehearing after remand by the court, see *Evco* v. *Jones,* 83 N.M. 110, 488 P.2d 1214 (Ct. App. 1971). The Bureau of Revenue, as has previously been argued, takes the position that if the taxes at issue were imposed on Evco's receipts from performing services, they would have been subject to tax. See *Western Livestock* v. *Bureau of Revenue,* 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944 (1938), and *Department of Treasury of State of Indiana* v. *Ingram-Richardson Manufacturing Company of Indiana,* 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 1313 (1941). However, if Evco's receipts were from selling tangible personal property to customers outside New Mexico and delivery of this property was made outside New Mexico, then it is the position of the Bureau that these receipts may not be taxed because to do so would place an unconstitutional burden on interstate commerce. See *J. P. Adams Manufacturing Co.* v. *Stover,* 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365 (1938); *Freeman* v. *Hewitt,* 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265 (1946); and *Gwin, White & Prince* v. *Henneford,* 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272 (1939).

The Court of Appeals in its second opinion in this matter stated:

> "We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if the incidents arise out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale." *Evco* v. *Jones,* 83 N.M. 110, 488 P.2d 1214, 1216 (Ct. App. 1971).

Although there is case law considering this distinction and presenting a variety of reasons for the distinction, the Bureau of Revenue thinks that the most probable reason the distinction is made and preference to the destination state given, is the recognition that substantially all states with gross receipts or sales tax have enacted compensating or use taxes to protect local merchants from competitive disadvantage. It appears to be clear that a buyer's state or destination state can impose a tax on the use or consumption of property after it comes to rest following interstate movement. This being so, taxation of the property by the seller's state or origin state threatens interstate commerce with cumulative economic burden which local sellers do not bear. Apportionment by the seller's state does not alleviate the problem, because the state of destination will tax the full value of the property. The problem could be alleviated if the destination state allowed a credit against compensating or use tax for sales, gross receipts, sales, compensating, or similar tax levied by another state and paid to that state, as does the New Mexico Gross Receipts and Compensating Tax Act, § 72-16A-16, N.M.S.A. 1953 (Supp. 1971). However, absent that type of credit provision, a cumulative burden would be possible, if not probable. See generally Lockhart, W. B., *The Sales Tax in Interstate Commerce,* 52 Harv. L.Rev. 617, 627 (1939).

It is possible that the Court of Appeals was considering the emergency school tax and gross receipts tax at issue here to be in the nature of a tax on manufacturing similar to the tax levied by the City of St. Louis in *American Manufacturing Company* v. *City of St. Louis,* 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084 (1919). That case decided that a tax on manufacturing which was *measured* by sales of goods which were first stored

and then sold to persons both inside and outside the city did not amount to a regulation of interstate commerce.

The New Mexico taxes at issue here were not imposed on the activity of manufacturing. Compare *Crown Zellerbach Corporation* v. *State,* 53 Wash.2d 813, 328 P.2d 884 (1958), appeal dismissed, 359 U.S. 531. The Emergency School Tax Act explicitly excluded the gross receipts of manufacturers. See § 72-16-4.3(C), N.M.S.A. 1953 (Appendix A, *infra,* p. 17). The Gross Receipts and Compensating Tax Act does not impose a tax on manufacturers but rather on receipts from ". . . selling property in New Mexico, from leasing property employed in New Mexico, and from performing services in New Mexico." Section 72-16A-3(E), N.M.S.A. 1953 (Supp. 1967) (Appendix A, *infra,* p. 18). Manufacturers would be taxed on their receipts from selling property in New Mexico to the extent no exemption or deduction applied. The definition of "manufacturing" contained in the Act definitely contemplates the sale of property rather than the performance of services. See § 72-16A-3(F), N.M.S.A. 1953 (Supp. 1967) (Appendix A, *infra,* p. 19).

In conclusion, the Bureau of Revenue wishes to make reference to the Court of Appeals' comment regarding G.R. Regulation 14.10-2, effective December 5, 1969. That regulation stated in part:

> "Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where delivery is made out-of-state by seller's vehicle, U.S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller."

In Appendix B to its brief in support of its motion for rehearing to the Court of Appeals, the Bureau presented representative statutes, regulations, and rulings from states imposing sales or gross receipts taxes which take the position reflected in G.R. Regulation 14.10-2. On the basis of this information, the Bureau asserts that quite a number of other states appear to have considered the position asserted by the Bureau under this point to be correct.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Writ of Certiorari which has been granted herein specifically reverse the Court of Appeals of the State of New Mexico, and that this Court specifically direct that final judgment be entered pursuant to the decision of this court.

Respectfully submitted,

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APPENDIX A

Constitution of the United States, Amendment XIV—Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 72-16-14.3, Subparagraph C, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, Chapter 325, § 2]—

C. The gross receipts of the business of every person engaging or continuing in the business of manufacturing, smelting, refining, reducing, processing, compounding, fabricating, packing, preserving, distilling, preparing for sale or commercial use, or the making of wares, commodities or material products other than the natural resource products set out immediately above in this section, and including the generation of electricity, shall be specifically excluded from taxation under this section; Provided that all such persons shall be required to obtain a license from the bureau of revenue in the same manner as other persons subject to taxation under the Emergency School Tax Act [72-16-2 to 72-16-47], and for the purpose of proving exemptions under this section shall, if required by the bureau of revenue, make reports on forms prescribed by the bureau showing the gross receipts of such business and the persons to whom such products were sold.

Section 72-16-4.9, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, Chapter 325, § 7]—

The tax shall be computed at an amount equal to three per cent [3%] of the gross receipts of any person engaging or continuing in the practice of any profession, or of any business in which the service rendered is of a professional, technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer.

Section 72-16-5, N.M.S.A. 1953 of the Emergency School Tax Act [N.M. Laws of 1963, Chapter 239, § 1 and N.M. Laws of 1966, Chapter 59, § 1]—

None of the taxes levied by the Emergency School Tax Act [72-16-2 to 72-16-47], as amended, shall be construed to apply to:

A. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to the government of the United States, its departments or agencies;

B. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to the state of New Mxico or any of its political subdivisions; and

C. Sales of tangible personal property, other than metalliferous mineral ores, whether refined or unrefined, made to nonprofit schools, colleges, hospitals, religious or charitable organizations in the conduct of their regular hospital, religious, charitable or nonprofit functions.

Section 72-16A-3, Subparagraph E of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

E. "Gross receipts" means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico, and includes any type of time-price differential and receipts from sales of property handled on consignment but excludes cash discounts allowed and taken.

In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, "gross receipts" means the reasonable value of the property or service exchanged.

When the sale of property or service is made under any type of charge, conditional or time sales contract or the leasing of property is made under a leasing contract, the

seller or lessor may elect to treat all receipts under such contracts as gross receipts as and when the payments are actually received. If the seller or lessor transfers his interest in any such contract to a third person, he shall pay the gross receipts tax upon the full sale or leasing contract amount.

"Gross receipts," for the purposes of the business of buying, selling or promoting the purchase, sale or leasing, as factor, agent or broker, on a commission or fee basis, of any property, service, stock, bond or security, includes only the total commissions or fees derived from the business.

Section 72-16A-3, Subparagraph F, of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

F. "Manufacturing" means combining or processing components or materials to increase their value for sale in the ordinary course of business but does not include contracting.

Section 72-16A-3, Subparagraph J, of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

J. "Service" means all activities engaged in for other persons for a consideration, which activities involve primarily the performance of a service as distinguished from selling property. "Service" includes contracting and all materials employed in contracting are to be treated as part of the service. However, sales of materials that will be employed in contracting to persons engaged in contracting are sales of tangible personal property.

Section 72-16A-14, Subparagraph G of the Gross Receipts and Compensating Tax Act, Effective July 1, 1967—

G. Receipts from selling tangible personal property, other than nonfissionable metalliferous mineral ore, to the United States or any agency or instrumentality thereof or the state of New Mexico or any political subdivision thereof may be deducted from gross receipts.

Where the taxpayer must use tangible personal property in the performance of his service, he must compute his school tax under Section 72-16-4.10 on the total receipts derived from the performance of the service and gross proceeds of sales of tangible personal property unless the industry of which he is a part has a common practice of billing material and labor separately. Where separate billing of material and labor is the trade practice, the taxpayer shall report gross receipts from labor under Section 72-16-4.10, N.M.S.A., 1953 Compilation, and gross receipts from materials under Section 72-16-4.5, N.M.S.A., 1953 Compilation. In the latter situation the taxpayer may execute a resale certificate under Section 72-16-4, N.M.S.A., 1953 Compilation, for the tangible personal property which he purchases and includes in the billing as materials.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-857

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Evco, a New Mexico corporation, d/b/a Evco Instructional Designs, Petitioner, herewith submits its reply brief in support of the Writ of Certiorari to the Court of Appeals of the State of New Mexico.

ARGUMENT

I.

The Court Should Not Consider a Non-Federal Question upon Grant of Petition for Writ of Certiorari to Consider a Federal Question.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). This jurisdictional section provides:

> "Sec. 1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, Treaties or statutes of, or commission held or authority exercised under, the United States."

In Part V., Jurisdiction on Writ of Certiorari, the Rules of the Supreme Court provide:

> "Rule 19. Considerations Governing Review on Certiorari.
>
> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be covered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

This Court has twice granted petitions for writ of certiorari in this case on the sole issue set forth as Point II of this Reply Brief and set forth as Point I in the Petitions and in the Brief for Petitioner.

Respondents have replied throughout these proceedings that they are in agreement with the position taken by Petitioner. These replies are set forth in pages 4 and 5 of the Brief for the Petitioner.

However, in their Brief for the Respondents, the Respondents seek to have this Court involve itself with the issue of whether Petitioner's activities were the sale of services or the sale of tangible personal property. This in turn appears to raise questions of "substantial evidence," the "intent of the New Mexico Legislature," and perhaps other considerations.

It has been pointed out repeatedly, and the Court has before it the opinions of the New Mexico Court of Appeals, that the Petitioner was selling tangible personal property rather than services. It is recognized that if the New Mexico Court of Appeals had made the opposite determination, this case would not be in its present posture, and no federal constitutional question would be involved.

This Court has granted certiorari to consider a federal question. Petitioner urges that other issues in the case, which are not federal issues, can not properly be considered. Under the jurisdictional statute quoted above, a federal question must be present. Whether there is such

tions. The jurisdiction is to review judgments, not opinions, and will not be exercised unless the judgment might be changed by the result. If the judgment rests on State grounds adequate to support it, whatever other grounds it rests on, it is not reviewable."

In Wright, LAW OF FEDERAL COURTS, pp. 426-27 (1963), the writer, in considering Supreme Court review, analyzes *Murdock* v. *Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875), and subsequent decisions, as follows:

"This case, and others which have built on it, lay down two fundamental propositions. The Court will not review a case, even though it contains a federal question, if there is an adequate state ground which supports the decision of the state court. Further, the Court will accept as binding upon it the state court's decision of questions of state law.

There has recently been an elaborate argument made that the framers of the Constitution intended that the Supreme Court would speak authoritatively on questions of state law as well as on questions of federal law. The historical evidence for this proposition is unconvincing, and the uniform practice of the Court has been to the contrary. It has considered that the state courts speak with final authority on questions of state law. The exceptions to this principle are very few. Decisions of the state court as to state law are only persuasive, rather than controlling, where state law is incorporated by reference in a federal statute, or where protection of a federal constitutional right would be thwarted if the state had the last word on state questions, as in determining whether there is a 'contract' within the meaning of the clause of the

Constitution prohibiting impairment of the obligation of contracts.

The other aspect of the rule of *Murdock* v. *Memphis* is that the Supreme Court cannot review a state decision at all if that decision rests on an adequate state ground. Thus there can be no review if the state court has decided the case exclusively on some ground of state law, and has never reached a federal question present in the case. Nor can there be review where the state court has decided both the state and federal questions, if its decision of the federal question was unnecessary in the light of its disposition of the state question. But if the state court has decided the case entirely on the federal question presented, the Supreme Court can review, even though there was a state question in the case which could have been the basis for decision . . ."

Respondents, in their Brief, point to the conflicts in decisions among the states regarding the issue of services vs. tangible personal property. The Court of Appeals noted these conflicts in making its decision. However, Petitioner does not understand that an issue becomes a federal question merely because state courts are not all consistent in their resolution of similar problems.

II.

Petitioner's Gross Receipts from Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery is Made Outside the State of New Mexico, Are Exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax As Being Sales in Interstate Commerce.

Respondents, at page 12 of their Brief, state:

"If Evco's gross receipts are determined to have been receipts from selling tangible personal property rather

than performing services, the Bureau of Revenue is in agreement with the argument presented by Evco in its brief on the merits."

This indicates that the parties are still in accord in their position on the constitutional issue. Upon the additional authorities cited by Respondents, Petitioner urges this Court to reverse the Court of Appeals of the State of New Mexico.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Writ of Certiorari which has been granted herein specifically reverse the Court of Appeals of the State of New Mexico, and that this Court specifically direct that final judgment be entered pursuant to the decision of this Court.

Respectfully submitted,

KENDALL O. SCHLENKER
JAMES M. PARKER
JAY R. PAYNE
CHARLES I. WELLBORN

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–857

Evco, dba Evco Instructional Designs, Petitioner, *v.* Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico, et al.	On Writ of Certiorari to the Court of Appeals of New Mexico.

[December 4, 1972]

PER CURIAM.

The petitioner, Evco, is a New Mexico corporation that employs writers, artists, and draftsmen to create and design instructional programs. It develops an educational idea into a finished product, that generally consists of reproducible originals of books, films, and magnetic audio tapes. Typical of its contracts is Evco's agreement with the Department of Agriculture to develop camera-ready copies of programmed textbooks, notebooks, and manuals to be used in an orientation course for forest engineers. Evco's contracts are negotiated and entered into outside New Mexico; it creates the reproducible originals in New Mexico, and then delivers them to its out-of-state clients. The customers in turn use the originals to publish however many books and manuals are needed to implement the instructional program.

The Commissioner of Revenue for New Mexico levied the State's Emergency School Tax and its Gross Receipts Tax on the total proceeds Evco received from these con-

tracts.[1] The company appealed this assessment to the Court of Appeals of New Mexico, arguing that these taxes on out-of-state sales imposed an unconstitutional burden on interstate commerce in violation of Art. I, § 8, of the Constitution. That court found that though the taxes were imposed on the proceeds of out-of-state sales of tangible personal property, rather than on the receipts from sales of services, such taxes were not an unconstitutional burden on commerce. 81 N. M. 724, 472 P. 2d 987.[2] The Supreme Court of New Mexico declined to review the judgment.

In his brief in opposition to the petition for certiorari which sought our review of that judgment, the Attorney General of New Mexico conceded that the State could not tax the receipts from sales of tangible personal property outside the State. We granted certiorari, vacated the judgment, and remanded the case to the Court of Appeals for reconsideration in light of the position taken by the Attorney General. 402 U. S. 969.

On remand, the Court of Appeals adhered to its prior findings that these taxes were imposed on out-of-state sales of tangible property, not services, but it concluded that the constitutionality of the taxes should not depend

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[1] Taxes were assessed for the period January 1, 1966, through December 31, 1968. From January 1, 1966, through June 30, 1967, the petitioner's receipts were subject to the Emergency School Tax Act. N. M. Stat. Ann. §§ 72-16-2—72-16-19, 1953 Compilation, *repealed by* N. M. Laws 1966, c. 47, § 22. From July 1, 1967, through December 31, 1968, the remainder of the taxable period, Evco's receipts were taxed under the Gross Receipts and Compensating Tax Act. N. M. Stat. Ann. §§ 72-16A-1—72-16A-19, 1953 Compilation (1971).

[2] The court did find, however, that the receipts from sales of tangible personal property to government agencies and certain specified organizations were statutorily exempted from taxation. Those specific exemptions are not at issue here.

on that distinction. It reinstated and reaffirmed its prior opinion finding the taxes constitutional. 83 N. M. 110, 488 P. 2d 1214. The Supreme Court of New Mexico again declined to review the case, and we granted certiorari. 405 U. S. 953.

Our prior cases indicate that a State may tax the proceeds from services performed in the taxing State, even though they are sold to purchasers in another State. Hence, in *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252, the Court upheld a state gross income tax imposed on a taxpayer engaged in the process of enameling metal parts for its customers. We accepted the finding of the court below that this was a tax on income derived from services, not from the sales of finished products, and we found irrelevant the fact that the sales were made to out-of-state customers. The tax was validly imposed on the service performed in the taxing State. See also *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250.

But a tax levied on the gross receipts from the sales of tangible personal property in another State is an impermissible burden on commerce. In *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, we rejected as unconstitutional a State's attempt to impose a gross receipts tax on a taxpayer's sales of road machinery to out-of-state customers.

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden

to which intrastate commerce is not exposed, and which the commerce clause forbids." 304 U. S., at 311.

See also *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434.

As on the previous petition for certiorari, both parties accept these propositions, and both agree that if the findings of the Court of Appeals are accepted, its judgment must be reversed.

The only real dispute between the parties centers on the factual question of the nature and effect of the taxes. The State contends that these taxes were actually imposed on the receipts from services performed in the State, not on the income from the sale of property outside the State. It argues that the out-of-state purchasers actually paid for the educational programs developed in New Mexico, not for the camera-ready copies that were only incidental to the services purchased. But the Court of Appeals rejected this interpretation of the facts. It found in effect that the reproducible originals were the *sine qua non* of the contract and that it was the sale of that tangible property in another State that New Mexico had taxed. "There are no exceptional circumstances of any kind that would justify us in rejecting the . . . Court's findings; they are not without factual foundation, and we accept them." *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160. See also *Grayson* v. *Harris*, 267 U. S. 352, 357–358; *Portland Ry. Light & Power Co.* v. *R. R. Commission*, 229 U. S. 397, 411–412.

Accordingly, since the Court of Appeals approved the imposition of a tax on the proceeds of the out-of-state sales of tangible personal property, its judgment is

Reversed.